

EXHIBIT A

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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

CG ENTERPRISES HOLDINGS, LLC, a
 California limited liability company; and
 STEPHEN M. COON, an individual;

Plaintiff,

vs.

WSP USA, INC., a New York corporation;
 WSP USA BUILDINGS, INC., a New York
 corporation; kW MISSION CRITICAL
 ENGINEERING, D.P.C., a New York design
 professional corporation; and DOES 1
 through 20, inclusive,

Defendants.

) Case No. 3:24-cv-00292-VC

) [Removed from Sonoma County Superior Court
) Case No.: 24CV00024]

) **DEFENDANTS' REPLY IN SUPPORT OF**
) **MOTION TO DISMISS PURSUANT TO**
) **FEDERAL RULES OF CIVIL**
) **PROCEDURE 12(B)(2), (3), AND (6) OR,**
) **IN THE ALTERNATIVE, TO STAY THIS**
) **ACTION PURSUANT TO 9 U.S.C. § 3, OR**
) **TRANSFER PURSUANT TO 28 U.S.C. §**
) **1404(a)**

) [Fed. R. Civ. P. 12(b); Civ.L.R. 7]

) Hearing Date: March 8, 2024

) Hearing Time: 10:00 a.m.

) Location: 450 Golden Gate Avenue,
) Courtroom 6, 17th Floor, San Francisco,
) California 94102

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INTRODUCTION

Plaintiffs’ Response to WSP’s Motion lays bare the now-undeniable fact that this case does not belong in this Court. Coon does not deny that he contrived a connection to California and filed suit in a court without personal jurisdiction to avoid the mandatory arbitration clause in his Employment Agreement (“Agreement”). Plaintiffs relegate any discussion of these threshold and dispositive issues to the end of their brief—ignoring entire provisions of the Agreement by asserting vague and novel jurisdictional theories with no legal support—all in a futile attempt to remain in California. This Court can and should reject each of Plaintiffs’ arguments. Coon is not allowed to haul his former New York employer into a California court in direct violation of the Agreement merely because he likes California law better, paid the \$70 fee to register an LLC in California, and is thinking about moving here someday from his admitted home in Arizona. Rather, Coon and CGE must submit their claims in arbitration.

Even if Plaintiffs could litigate in this Court, however, their claims fail on the merits. Plaintiffs offer no support for their assertions that simply because Coon contrived a connection to California, California’s interest in this litigation is impenetrable and justifies ignoring the Parties’ agreed-to choice-of-law clause and the Dormant Commerce Clause; that CGE has standing under § 16600; or that Coon and CGE have lost money or property as required to state a § 17200 claim. Moreover, Plaintiffs simply do not respond to WSP’s arguments that § 16600 does not void the restrictive covenants in this case because, as Coon openly admitted, the covenants in question were executed in connection with a sale of Coon’s interests in kW MCE to WSP. Instead, Plaintiffs opt repeatedly to trumpet their *ipse dixit* assertion that § 16600 controls.

Lastly, Plaintiffs offer no rebuttal to Defendants’ arguments to transfer other than incorrectly to assert—without a shred of legal support—that New York lacks jurisdiction over them and that WSP somehow “acknowledged” that the Southern District of New York is a less convenient forum than California. Against this backdrop, and for the reasons set forth in WSP’s Motion, the Court should either dismiss, stay, or transfer Plaintiffs’ claims.

ARGUMENT

I. Plaintiffs Must Arbitrate Their Claims.

Plaintiffs do not dispute that their claims are arbitrable under the Agreement. Instead, burying their discussion of this dispositive issue near the end of their Brief, they argue that they can avoid the arbitration clause because of the Agreement’s narrow injunction language that gives either party the option of seeking an injunction in a court of competent jurisdiction in limited circumstances. But Plaintiffs ignore the injunction clause’s plain language. Although the injunction clause allows “either party” to file a court action for “specific performance and/or injunctive or other relief,” the filing party may do so only “*in order to enforce or prevent any violations of the provisions*” of the Agreement. Plaintiffs concede that they are not asking this Court to enforce the Agreement. To the contrary, they argue that the Agreement is not enforceable. Plaintiffs cannot rest on an isolated and incorrect reading of the “either party” language to the exclusion of other contract terms. *See Int’l Bhd. of Teamsters v. NASA Servs., Inc.*, 957 F.3d 1038, 1042 (9th Cir. 2020) (“Individual clauses and particular words must be considered in connection with the rest of the agreement, and all of the writing and every word of it will, if possible, be given effect.”). Accordingly, under the plain language of the Agreement, they are not permitted to ask a court for their requested “injunction” (which, as mentioned during oral argument on Plaintiffs’ Motion, is in reality a request for a declaratory judgment on the validity of the Agreement).

Moreover, contrary to Plaintiffs’ assertions, the plain language of the injunction clause is not “inequitable. (Pls.’ Opp. at 24.) As an initial matter, the clause applies to both WSP and Coon: If WSP were threatening to breach any provision of the Agreement, Coon could invoke the injunction clause to prevent the breach. The fact that, in the present circumstances, WSP can bring an injunction action and Coon cannot is simply a consequence of Coon’s decision to breach the Agreement, not the result of any unfairness. Additionally, WSP has sought injunctive relief in aid of arbitration, unlike Coon, who seeks an “injunction” to avoid the contractually-mandated arbitration altogether. Nor will Plaintiffs suffer any hardship simply from their inability to seek the

1 requested “injunction” on an emergency basis in this Court or invoke the AAA’s emergency rules.¹
 2 Plaintiffs’ claims can be asserted as defenses to WSP’s claims in the arbitration: Before the
 3 arbitrator can rule against Coon on WSP’s claims, the arbitrator will need to rule on any invalidity
 4 defense if and when asserted. And, if Coon prevails on the merits in the arbitration, he can seek a
 5 court order to enforce the arbitrator’s ruling regarding the contract’s enforceability, if necessary.
 6 Similarly, in any court action seeking an injunction in aid of arbitration to enforce the Agreement,
 7 the court would need to address WSP’s likelihood of success on the merits, which in turn will
 8 require it to address Coon’s defenses to enforceability. Accordingly, there is nothing “inequitable”
 9 about interpreting the Agreement as written.

10 In their Reply in support of their Motion for Preliminary Injunction, Plaintiffs rely on
 11 California state court cases to argue that the arbitration clause is unenforceable. (Pls.’ Reply at 5
 12 (citing *Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141 (Cal. Ct. App. 2015)).) But “[f]ederal
 13 law governs the validity of a forum selection clause.” *TAAG Linhas Aeras de Angola v.*
 14 *Transamerica Airlines, Inc.*, 915 F.2d 1351, 1353 (9th Cir. 1990); accord *Finsa Portafolios, S.A.*
 15 *de C.V. v. OpenGate Capital, LLC*, 2017 WL 6882888, at *5 (C.D. Cal. Sept. 26, 2017)
 16 (“Arbitration clauses and forum selection clauses are subject to the same analysis.”); see also
 17 *O’Keeffe’s Inc. v. Access Information Technologies Inc.*, 2015 WL 6089418, at *4 n. 2 (N.D. Cal.
 18 Oct. 16, 2015) (declining to apply *Verdugo*). Federal courts in California routinely enforce forum
 19 selection clauses over plaintiffs’ objections that the transferee venue might not apply § 16600. See,
 20 e.g., *Thermomagnetics & Cryogenics, Inc. v. Pittsburgh Universal, LLC*, 2016 WL 11002591, at *4
 21 (C.D. Cal. Dec. 19, 2016) (holding that forum-selection clause was enforceable in § 16600 action);
 22 *Britvan v. Cantor Fitzgerald, L.P.*, 2016 WL 3896821, at *3 (C.D. Cal. July 28, 2016) (rejecting

23
 24
 25 ¹ Notably, in the arbitration, WSP argued that it would be inefficient to require WSP to go to
 26 a court to seek an injunction in aid of arbitration and that the language of the Agreement supported
 27 the use of AAA’s emergency rules. Coon, however, insisted that the Agreement be read narrowly
 28 to exclude the requested injunctive relief. He now is attempting to flip that argument on its head,
 arguing that a plain-language reading of the Agreement is inequitable because of the consequences
 of his own arguments in the arbitration. The Court should reject that gamesmanship.

1 plaintiffs' argument "that the arbitration forum selection clause is invalid because it violates
2 California's public policy against covenants not to compete"). This Court should do the same.

3 Finally, the arbitration provision applies to both Coon *and CGE*. "An agreement to arbitrate
4 before a specified tribunal is, in effect, a specialized kind of forum-selection clause." *Scherk v.*
5 *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). "[C]losely related parties may be bound by a forum-
6 selection clause even though they were not signatories to the contract containing the clause."
7 *Dexcom, Inc. v. Medtronic, Inc.*, 2021 WL 5908930, at *5 (S.D. Cal. Dec. 14, 2021); *see also Lucas*
8 *v. Hertz Corp.*, 875 F. Supp. 2d 991, 1002–03 (N.D. Cal. 2012) (explaining that arbitration clauses
9 apply to nonsignatories where "each of a signatory's claims against a nonsignatory makes reference
10 to or presumes the existence of the written agreement"). Consequently, courts in the Ninth Circuit
11 routinely hold that new employers are bound by forum-selection clauses in the employee's prior
12 employment agreement. *See Build Grp., Inc. v. N.R. Windows, Inc.*, 2022 WL 3697355, at *4 (C.D.
13 Cal. Feb. 17, 2022) ("Courts have found that '[e]mployers in [Plaintiffs'] position are sufficiently
14 related to be bound by such clauses.'" (alterations in original) (collecting cases)); *Dexcom, Inc.*,
15 2021 WL 5908930, at *5; *Meyer v. Howmedica Osteonics Corp.*, 2015 WL 728631, at *13 (S.D.
16 Cal. Feb. 19, 2015); *Robeson v. Twin Rivers Unified Sch. Dist.*, 2014 WL 1392922, at *4 (E.D. Cal.
17 Apr. 9, 2014). Indeed, a contrary rule would allow employees to avoid their contractual obligations
18 by simply creating a shell entity to file a declaratory judgment action on their behalf, as Coon has
19 done here.

20 Courts have also held that non-signatories can be bound by an arbitration clause based on
21 equitable principles. In *Gurler v. Westpac Surgical, LLC*, 2020 WL 10317436 (C.D. Cal. Dec. 11,
22 2020), the plaintiff's company, Cal Surgical, entered a marketing agreement with the defendant that
23 included restrictive covenants and an arbitration clause. After the defendant terminated the
24 agreement, the plaintiffs began competing against it in violation of the restrictive covenants.
25 "Anticipating legal action from Defendant based on the 'non-compete and non-solicitation
26 provisions in the Agreement,' Gurler and Cal Surgical brought" an action seeking a declaration that
27 the restrictive covenants were invalid under § 16600 or were released when the defendant
28

1 terminated the agreement. *Gurler*, 2020 WL 10317436, at *1. The court held that Gurler was
 2 bound by the arbitration clause under equitable principles, even though he was not a party to the
 3 agreement, because “Gurler has fully inserted himself into this litigation over the Agreement—and
 4 has done so in a way that has the potential to cause substantial prejudice to Defendant, to undermine
 5 the purpose of the FAA, and to produce inconsistent results.” *Id.* The same is true here: Compelling
 6 Coon to arbitrate while CGE litigates its claims here would undermine the FAA and create a risk of
 7 inconsistent results if this Court and the arbitrator disagree about the validity of Coon’s restrictive
 8 covenants.

9 In sum, CGE “cannot avoid the enforcement of a forum-selection clause in the same contract
 10 it asks the court to interpret.” *Dexcom, Inc.*, 2021 WL 5908930, at *5. Because Plaintiffs’ claims
 11 are arbitrable and the injunction clause does not apply, the FAA requires this Court either to stay or
 12 dismiss this action in favor of the pending arbitration.

13 **II. The Court Should Dismiss for Lack of Personal Jurisdiction over WSP.**

14 Plaintiffs do not dispute that the only connection between this action and California—the
 15 formation of CGE under California law—was contrived by Coon for the sole purpose of taking
 16 advantage of California law. As a matter of law, however, neither Coon’s unilateral actions nor
 17 CGE’s residency in California can establish jurisdiction in California. *See Nantes v. New London*
 18 *Cty. Mut. Ins.*, 441 F. App’x 517, 518–19 (9th Cir. 2011) (finding no jurisdiction where “NLC’s
 19 purported contacts with California were directly attributable to Petitioners’ unilateral decisions to
 20 move back to the state”); *IPS Shared Tech. Servs., Inc. v. Overwatch Sys., Ltd.*, 2014 WL 2110341,
 21 at *3 (N.D. Cal. May 20, 2014) (“[C]ourts have repeatedly held that the unilateral activity of a
 22 plaintiff cannot confer jurisdiction.”); *Continental Appliances, Inc. v. Thomas*, 2012 WL 3646887,
 23 at *5 (N.D. Cal. Aug. 23, 2012) (“[T]he plaintiff’s residence [in the forum] alone is not enough . . .
 24 .”).² Rather, Plaintiffs must show that WSP “perform[ed] some act or consummate[d] some
 25

26 ² Similarly, Coon’s alleged decision to move to California cannot establish jurisdiction either.
 27 Not only is this another unilateral action by Coon, it also occurred after the filing of the Complaint
 28 and therefore cannot be used to establish jurisdiction. *See Nantes*, 441 F. App’x at 519 (domicile
 is determined as of the date of filing).

1 transaction within the forum by which it ‘purposefully avail[ed]’ itself of the privilege of conducting
2 activities in the forum, thereby invoking the benefits and protections of the forum.” *Overton v.*
3 *Vanzant*, 2001 WL 1911359, at *4 (D. Or. Dec. 13, 2001). Plaintiffs’ also must show that the
4 conduct that satisfies the purposeful availment or direction tests is the conduct that underlies their
5 claims. *Id.*

6 Plaintiffs incorrectly argue that WSP purposefully availed itself to jurisdiction in California
7 by “doing business in California, entering into Restrictive Covenants that purport to prevent [Coon]
8 from doing business within or from California, and seeking to enforce those Restrictive Covenants.”
9 (Pls.’ Opp. at 17.) They further argue that WSP’s business in California is the conduct underlying
10 their claims. Plaintiffs have not cited a single case to support this novel theory of jurisdiction. Nor
11 could they. *See Inmar Rx Solutions, Inc. v. Devos, Ltd.*, 786 F. App’x 445 (5th Cir. 2019)
12 (dismissing employee’s challenge to noncompete for lack of personal jurisdiction in Texas even
13 though employee’s new business was incorporated there and the defendants sent cease-and-desist
14 letters to the new employer there).

15 The fact that WSP has offices, employees, and clients in California “is not enough to support
16 the demand that [WSP] be amenable to suits unrelated to that activity.” *Bristol-Myers Squibb Co.*
17 *v. Super. Ct. of Cal.*, 582 U.S. 255, 264 (2017). First, WSP’s business in California is not the basis
18 of Plaintiffs’ claims. Plaintiffs’ claims arise out of the signing (and potentially the attempted
19 enforcement) of the Agreement, which is what § 16600 purportedly prohibits. *See Miller v. Head*
20 *USA, Inc.*, 2016 WL 10570274, at *4 (C.D. Cal. Dec. 16, 2016). None of that conduct occurred in
21 California. The Agreement itself was between Coon, an Arizona resident, and kW MCE, a New
22 York resident, and was not signed in California. The Agreement does not reference California.
23 Plaintiffs concede that the restrictive covenants “do not contain a specific geographic restriction,
24 but are instead geographically restricted based on the location of” a specific subset of WSP’s clients,
25 prospective clients, and employees. (Decl. of S. Coon ¶ 27, Doc. No. 34-1.) Moreover, Coon is
26 the sole defendant in the New York arbitration and injunction action, and WSP did not even know
27

1 that CGE existed (let alone resided in California) until after this action and the arbitration were filed
2 on the same day.³ For these reasons alone, the Court lacks jurisdiction over WSP.

3 Second, even assuming *arguendo* WSP's California business could theoretically be the
4 conduct underlying Plaintiffs' claims, Plaintiffs have not shown that it in fact does underly their
5 claims. Although the restrictive covenants can apply to certain WSP clients and employees located
6 in California, Plaintiffs conspicuously avoid asserting that WSP's conduct is actually preventing
7 them from soliciting any client or employee in California. Despite alleging that WSP has clients
8 and employees here, Plaintiffs do not allege that they have actually started working in California,
9 or that they have any reasonable prospect of competing for WSP's California clients or employees,
10 or even that they intend to do so. Instead, they vaguely assert that they will work "within *or from*
11 California." (Pls.' Opp. at 2, 7, 8, 11, 13–15, 17–24 (emphasis added)). Today, a lot of work can
12 be done remotely "from" California for non-California clients. Indeed, WSP has reason to believe
13 that Coon is in fact soliciting WSP clients who are not located in California, and WSP knows that
14 Coon has solicited employees who were based in its office located in the Northern District of New
15 York. Moreover, Plaintiffs' assertion that if Coon bids for or accepts any job in California, he will
16 necessarily be violating the restrictive covenants, is simply untrue. Plaintiffs misrepresented to the
17 Court the pool of clients to whom the restrictive covenants apply. The noncompete provisions apply
18 only to clients and prospective clients to whom Coon had specifically-defined types of exposure
19 while at kW MCE. Consequently, the client pool for which Coon is prevented from competing is
20 effectively some subset of clients and prospective clients of kW MCE, which is much smaller than
21 the combined WSP business, and has very little presence in California. Thus, not every California
22 client is covered by the restrictive covenants, and Plaintiffs do not allege that they intend to compete
23 for any California clients, let alone California clients covered by the restrictive covenants.

24 But even if Plaintiffs identified a WSP client or employee located in California for whom
25 they intend to compete, and even if that client or employee also is covered by the restrictive
26

27 ³ WSP was unaware that Coon had filed the California action when WSP commenced
28 arbitration the same day.

1 covenants, WSP’s business with that client/employee still would not underly Plaintiffs’ claims.
 2 Plaintiffs do not allege that the restrictive covenants are void because they would prevent Coon
 3 from competing specifically for California clients and employees. To the contrary, Plaintiffs seek
 4 to invalidate the restrictive covenants *in their entirety*, including as to non-California clients and
 5 employees, again stating that they intend to work “within *or from* California” and repeatedly
 6 asserting that § 16600 applies because CGE is a (allegedly) a California employer—not because
 7 they intend to compete for clients located in California.⁴ Similarly, WSP is seeking to prevent Coon
 8 from competing for the clients and employees who fall within the categories described in the
 9 Agreement *regardless of where they are located*. WSP has not targeted or even mentioned
 10 California clients or employees in the arbitration. “To put it another way, there is no reason to think
 11 that had Defendant not been [doing business] in California, the parties would not have entered into
 12 the” restrictive covenants, that WSP would not have sought to enforce the restrictive covenants in
 13 exactly the same way that it has, or that Plaintiffs would not have filed this action. *Miller*, 2016
 14 WL 10570274, at *4. Accordingly, Plaintiffs have not shown that their claims arise out of WSP’s
 15 business in California.

16 Plaintiffs also argue that if WSP prevails in the arbitration, it will need to file an action in
 17 California to enforce the award against CGE, thus purposefully availing itself of California law.
 18 Plaintiffs are incorrect. First, WSP has not yet sought to enforce anything. Plaintiffs cannot base
 19 jurisdiction on what WSP might do in the future. Second, the Agreement explicitly provides that
 20 any action to enforce an arbitration award must be brought in New York. Again, CGE is bound by
 21 the Agreement’s forum selection clauses in actions relating to the restrictive covenants. WSP thus
 22 will not have to file anything in California to enforce the award. Third, even if CGE were not bound
 23 by the forum selection clauses, WSP likely will not need to enforce any arbitration award against
 24 CGE anyway because WSP intends to enforce the arbitration award against Coon alone in New
 25 York.

26 ⁴ (See Pls.’ Mot. for TRO at 13, Doc. No. 6 (asserting that Coon has a “right to be employed
 27 by *any California employer* that is interested in hiring Steve” (emphasis added)); Pls.’ Reply at 2,
 28 Doc. No. 35 (asserting that the restrictive covenants “*facially violate*” § 16600).)

1 In sum, Plaintiffs have not shown that WSP purposefully availed itself of the benefits or
 2 protections of California through the conduct underlying their claims. Instead, they impermissibly
 3 rely on their own unilateral actions and fail to present facts supporting their own legally deficient
 4 jurisdictional argument.

5 Finally, Plaintiffs alternatively rely on inapposite cases that predate the Supreme Court’s
 6 numerous, recent personal jurisdiction decisions, including *Daimler*, for the general proposition that
 7 personal jurisdiction can be based on out-of-forum conduct that is “purposefully directed toward
 8 forum residents.” (Pls.’ Opp. at 16 (quoting *Hirsch f. Blue Cross Blue Shield of Kansas City*, 800
 9 F.2d 1474 (9th Cir. 1986)).) But Plaintiffs have not satisfied the purposeful-direction test either.
 10 Courts in the Ninth Circuit have held that the purposeful-direction test is satisfied only if the
 11 defendant “committed an intentional action expressly aimed at the forum state, knowing that the
 12 brunt of the expected injury would be felt by the plaintiff in the forum state.” *Power Integrations,*
 13 *Inc. v. Penbrothers Int’l Inc.*, 2019 WL 6117479, at *3 (N.D. Cal. Nov. 18, 2019). Mere knowledge
 14 that a plaintiff resides in the forum and may be effected is not enough. *See Mitchell v. Berwyn*
 15 *Partners, Inc.*, 2018 WL 3328220, at *6–7 (N.D. Cal. July 6, 2018).

16 Here, Plaintiffs have not shown that the alleged out-of-forum conduct underlying Plaintiffs’
 17 claims—entering and attempting to enforce the Agreement—was expressly aimed at California or
 18 that WSP knew that the brunt of that conduct would be felt in California. As explained above, the
 19 Agreement itself had nothing to do with California at the time it was signed, WSP did not even
 20 know that CGE existed (let alone resided in California) until after this action and the arbitration
 21 were filed, and WSP’s arbitration action is not specifically targeting California clients and
 22 employees. *Cf. Fastpath, Inc. v. Arbela Techs. Corp.*, 953 F. Supp. 2d 971, 977 (S.D. Iowa 2013)
 23 (finding no jurisdiction for breach of restrictive covenants that “is not geographically limited to
 24 Iowa, but, rather, calls for a world-wide prohibition on the developing, marketing, sale, and
 25 licensing of products that are competitive with those developed, marketed, sold, or licensed by the
 26 other party to the Agreement”); *Miche Bag, LLC v. Cook*, 2009 WL 1707949, at *3 (D. Utah June
 27 17, 2009) (“Although Ms. Cook may have known her conduct would be felt in Utah, those effects

were ‘no more than foreseeable side-effects.’”). WSP did not know at the time it filed the arbitration—and in fact still does not know—whether Coon specifically intends to target WSP’s California clients or employees who are covered by the criteria set out in the Agreement. If Plaintiffs choose to pursue WSP’s California clients and employees, that is Plaintiffs’ own unilateral action that cannot affect the purposeful-direction analysis. Accordingly, none of WSP’s out-of-forum conduct was expressly aimed at California, and WSP had no reason to think that its effects would especially be felt here.

Because Plaintiffs have not established this Court’s jurisdiction over WSP through purposeful avilment or direction, their claims should be dismissed for this independent reason.

III. Venue Is Improper in This District.

For the same reasons that this Court lacks jurisdiction, venue is also improper. Contrary to Plaintiffs’ assertions, the events underlying this action did not occur here. Again, the contract was formed in New York and (potentially) Arizona. The arbitration and preliminary injunction action are in New York. And, assuming, *arguendo*, that WSP’s business in this District are the conduct underlying Plaintiffs’ claims (they are not), Plaintiffs have not alleged that there are any WSP clients or employees, let alone clients or employees in this District, that Plaintiffs intend to compete for or solicit but cannot because they are covered by the restrictive covenants. Accordingly, to the extent the Court does not dismiss in favor of arbitration or for lack of personal jurisdiction, venue is improper and this action should be dismissed or transferred to the Southern District of New York.

IV. Plaintiffs Fail to State a Claim for Relief

A. CGE Lacks Standing to Pursue Its § 16600 Claim.

Section 16600 specifically creates a cause of action and specifically enumerates who may bring that cause of action. Employers are not on the list. Plaintiffs have not cited a single case where a court found that employers have standing to bring § 16600 claims. In the only case they do cite, the former employer “d[id] not appear to challenge [the new employer’s] standing.” *Application Grp., Inc. v. Hunter Grp., Inc.*, 61 Cal. App. 4th 881, 893 (Cal. Ct. App. 1998). Moreover, that court cited § 1060—which allows a “person interested under a . . . contract” to seek

1 declaratory relief as to their “legal rights and duties”—as the presumed basis for standing, even
 2 though courts have held that third parties lack standing under § 1060 where their right to relief is
 3 dependent on the result of existing litigation between the contracting parties. *See Otay Land Co. v.*
 4 *Royal Indem. Co.*, 169 Cal. App. 4th 556, 566 (Cal. Ct. App. 2008). Here, CGE’s ability to hire
 5 Coon to work on projects that compete with WSP is dependent on the outcome of the arbitration
 6 between WSP and Coon. CGE thus lacks standing.

7 **B. New York Laws Governs This Dispute.**

8 Just as the Agreement unambiguously requires Plaintiffs to arbitrate their claims in New
 9 York, it also unambiguously provides that New York law governs their claims. Contrary to
 10 Plaintiffs’ assertions, New York has a much stronger interest in this case for all the reasons set out
 11 in WSP’s Motion. Plaintiffs’ reliance on *Stryker Sales Corp. v. Zimmer Biomet, Inc.*, 231 F. Supp.
 12 3d 606 (E.D. Cal. 2017), is misplaced. In that case, a former employer sued its former employee,
 13 who had *specifically worked* in “a geographic area within the Central Valley of *California*” and
 14 left to work for an *existing* competitor that did business in California, alleging violations of
 15 restrictive covenants and tortious interference with its California clients. Here, by contrast, Coon
 16 was not assigned to work exclusively with WSP’s California clients and has manufactured a
 17 “California-based” competitor for the sole purpose of escaping his contractual obligations.

18 Plaintiffs’ reliance on the Northern District of New York’s decision to dismiss WSP’s action
 19 for a preliminary injunction in aid of arbitration is also misplaced. WSP respectfully submits that
 20 the New York district court erred in both holding that the first-filed rule applied (given Plaintiffs’
 21 forum shopping, among other reasons) and that personal jurisdiction was lacking in New York. *See*
 22 Part V, *infra*. But in any event, the New York district court did not address whether New York had
 23 any interest in the action or the application of its law to these claims. Indeed, regardless of how
 24 that court ruled, the New York arbitration would continue under New York law.

25 Because New York law governs this dispute, and Plaintiffs have not shown that the
 26 restrictive covenants are unenforceable under New York law, Plaintiffs’ claims must be dismissed.

27 **C. Plaintiffs’ Claims Impermissibly Apply California Law Extraterritorially.**

Contrary to Plaintiffs’ assertions, the Dormant Commerce Clause prohibits more than just economic protectionism by states. As explained in WSP’s Motion, the Dormant Commerce Clause also “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.” *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015). Plaintiffs do not dispute that § 16600, on its face and as applied to this case, does exactly that: It regulates a contract that was negotiated, signed, and performed entirely outside of California by parties who are not California residents. For that reason alone, Plaintiffs’ claims should be dismissed.

Section 16600 separately violates the Dormant Commerce Clause because it requires out-of-forum companies “to comply with the strictest standard of several states in order to continue an interstate business extending over many states.” *Herbert v. Los Angeles Raiders, Ltd.*, 23 Cal. App. 4th 414, 422 (Cal. Ct. App. 1991). Plaintiffs argue that *Herbert* does not apply because it concerned professional football. That is a distinction without a difference. In *Herbert*, the court found that § 16600’s application to restrictions on a plaintiff’s ability to obtain employment imposed by an out-of-state business violated the Dormant Commerce Clause. This Court should do the same.

Although Plaintiffs argue that § 16600 applies only when “California has the greater interest in the” action, under Plaintiffs’ choice-of-law analysis, California would have the greater interest in virtually every case. Moreover, Plaintiffs’ suggestion that WSP can avoid § 16600 by creating a carveout from its restrictive covenants that allows former employees to compete “within or from California” does not save their claims. First, Coon is not competing “from” California right now and does not intend to compete only “within” California—He is still in Arizona and he has solicited employees based out of Troy, New York. Second, such a carveout would swallow the entire noncompete and nonsolicitation clauses if it would allow (as Plaintiffs claim) the employee to compete for non-California clients and employees by merely forming a California shell company (particularly if the employee, like Coon, is still living outside of California).

As Plaintiffs’ claims violate the Dormant Commerce Clause, they should be dismissed.

D. The Restrictive Covenants Do Not Violate § 16600.

1 Plaintiffs do not respond to WSP's argument that §16600 does not apply to the provisions
 2 in Coon's Agreement prohibiting him from using or disclosing WSP's confidential information and
 3 trade secrets, or to the provision prohibiting Coon from soliciting WSP's employees. (Mot. at 17.)
 4 Accordingly, to the extent Plaintiffs' claims are based on those provisions, they must be dismissed.

5 The noncompete and client-nonsolicitation provisions also do not violate § 16600 because
 6 the Agreement was signed in connection with the sale of kW MCE. In response, Plaintiffs rely on
 7 *Fillpoint, LLC v. Maas*, 208 Cal. App. 4th 1170 (Cal. App. Ct. 2012). Plaintiffs do not, however,
 8 respond to the numerous reasons set out in WSP's Motion explaining why that case does not apply
 9 here. WSP stands by those arguments, particularly in view of Coon's open admission that the
 10 Agreement was executed "as part of the merger" in which he sold his interest in kW MCE to WSP.
 11 (Decl. of S. Coon ¶ 23, Doc. No. 1-1 at 40.)

12 Because Plaintiffs' have not shown that the restrictive covenants violate § 16600, their
 13 claims should be dismissed.

14 **E. Plaintiffs Fails to State a § 17200 Claim.**

15 Plaintiffs argue that "[d]iversion of personnel and other resources to respond to an attempt
 16 to enforce a non-compete constitute an economic injury under § 17200." (Pls.' Opp. at 13.) But
 17 Plaintiffs do not allege in their Complaint that they have had to divert resources to respond to the
 18 arbitration. In fact, CGE has not had to respond to anything because it is not a defendant in any of
 19 these cases. Moreover, the cost of bringing suit, by itself, is insufficient to satisfy § 17200. *See*
 20 *Cordon v. Wachovia Mortg.*, 776 F. Supp. 2d 1029, 1039 (N.D. Cal. 2011) ("Under Plaintiff's
 21 reasoning, a private plaintiff bringing a UCL claim automatically would have standing merely by
 22 filing suit."). Because Plaintiffs have not alleged a loss of money or property, they fail to state a §
 23 17200 claim.

24 **V. The Court Should Transfer This Action to the Southern District of New York.**

25 Plaintiffs do not even attempt to rebut WSP's multiple arguments for why a transfer would
 26 be appropriate under the multi-factor test used to analyze transfer motions brought under 28 U.S.C.
 27 § 1404(a). Instead, Plaintiffs incorrectly assert that WSP somehow conceded that the Southern
 28

1 District of New York “is not an ideal forum” by seeking a preliminary injunction in the Northern
2 District of New York, and continue to lean on their contrived and artificial connection to California
3 and § 16600. (Pls.’ Opp. at 18.) The Northern District of New York is where kW MCE and the
4 emergency arbitrator in place at the time are located. WSP’s decision to file there does not imply
5 that the Southern District is inconvenient, and certainly not less convenient *than California*, both for
6 WSP, the courts, and the witnesses who will already have to testify in the New York arbitration.
7 Moreover, as explained above, New York has a greater interest than California in this litigation,
8 and Plaintiffs’ failure to address the remaining convenience factors should be deemed an admission
9 that they favor transfer to the Southern District of New York. *See Cole v. Quest Diagnostics, Inc.*,
10 2023 WL 6201702, at *4 (E.D. Cal. Sept. 22, 2023) (granting motion to transfer where plaintiff
11 failed to address public interest factors).

12 The only other argument Plaintiffs assert against transfer is that New York lacks jurisdiction
13 over them. As an initial matter, “[t]he transferee court need not have personal jurisdiction over
14 Plaintiff[s] in order for transfer to be granted under 28 U.S.C. § 1404(a) because the requirement of
15 personal jurisdiction ‘does not protect the right of a plaintiff to bring suit in a forum that is
16 convenient for him.’” *Doe v. Spahn*, 2021 WL 6052088, at *6 (N.D. Cal. Dec. 21, 2021).
17 Accordingly, the Court should disregard Plaintiffs’ argument.

18 In any event, New York does have personal jurisdiction over Plaintiffs. Coon consented to
19 New York’s jurisdiction as to his claims (1) when he signed an employment agreement with a New
20 York employer that allows (and in most cases, including this one, requires) arbitration of claims
21 relating to the Agreement in New York under New York law and requires enforcement of any
22 arbitration award in New York courts; and (2) by participating in the New York arbitration. *See*
23 *Doctor's Assocs. v. Stuart*, 85 F.3d 975, 983 (2d Cir. 1996) (“A party who agrees to arbitrate in a
24 particular jurisdiction consents not only to personal jurisdiction but also to venue of the courts
25 within that jurisdiction.”); *Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd.*, 2010 WL 1050988, at *4
26 (S.D.N.Y. Mar. 23, 2010) (New York arbitration clause gave court personal jurisdiction over
27 defendant to issue injunctions in aid of arbitration). As explained above, those clauses of the

1 Agreement also apply to CGE. Similarly, Coon also purposefully availed himself to jurisdiction in
 2 New York because the long-term contract underlying Coon's claims is with a New York business
 3 and contemplates substantial performance in New York, including Coon having continuous
 4 telephonic and email contact with employees in kW MCE's Troy office, Coon visiting to that office,
 5 and the arbitration and enforcement of any disputes about the employment relationship.

6 Accordingly, if this Court does not dismiss or stay this action, it should transfer it to the
 7 Southern District of New York.

8 **CONCLUSION**

9 For the forgoing reasons, this Court should dismiss this case. Alternatively, the Court should
 10 stay the case pending resolution of the ongoing arbitration in New York, or transfer the case to the
 11 Southern District of New York.

12
 13 Dated: February 23, 2024

HOLLAND & KNIGHT LLP

14
 15 By: /s/ Samuel J. Stone

16 Attorney for Defendants

17 WSP USA, INC., WSP USA BUILDINGS INC., and
 18 kW MISSION CRITICAL ENGINEERING, D.P.C.

CERTIFICATE OF SERVICE

I, Sam Stone, hereby certify that on February 23, 2024, I caused the foregoing Reply in Support of WSP's Motion to Dismiss to be served on all Parties in this action by filing it on this Court's CM/ECF system.

/s/ Sam Stone

Sam Stone